

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
BEAUMONT DIVISION

FRAZIER PORTER	§	
VS.	§	CIVIL ACTION NO. 1:19-CV-295
TOBY POWELL, ET AL.	§	

**MEMORANDUM ORDER OVERRULING PLAINTIFF’S OBJECTIONS AND ADOPTING  
THE MAGISTRATE JUDGE’S REPORT AND RECOMMENDATION**

Plaintiff Frazier Porter, a former prisoner confined at the Stiles Unit of the Texas Department of Criminal Justice, Correctional Institutions Division (TDCJ-CID), proceeding *in forma pauperis*, filed this civil rights action pursuant to 42 U.S.C. § 1983 against Toby Powell, Jordan Landrio, Emma Glenn, Brendan Dunlap, Clara Owens, and Jessica Judy.

The court ordered that this matter be referred to a United States magistrate judge for consideration pursuant to applicable laws and orders of this court. The magistrate judge recommends granting Defendant Powell's Motion for Summary Judgment. (Doc. #93.)

The court has received and considered the Report and Recommendation of United States Magistrate Judge (Doc. #106), filed pursuant to such order, along with the record and the pleadings. Plaintiff filed Objections to the Report and Recommendation. (Doc. #107.) Several days later, Plaintiff filed a signed Declaration in Support of Response in Opposition. (Doc. #108.) Summary judgment evidence is due when a response is filed, not after entry of a report and recommendation, particularly when Plaintiff is not proceeding *pro se* and counsel has offered no explanation as to why the evidence could not have been filed timely. Nevertheless, the court has considered the signed Declaration.

The court has conducted a *de novo* review of the Objections in relation to the pleadings and the applicable law. *See* FED. R. CIV. P. 72(b). After careful consideration of all the pleadings and the relevant case law, the court concludes that Plaintiff's Objections lack merit.

The magistrate judge recommended granting summary judgment to Defendant Powell because the competent summary judgment evidence was insufficient to create a genuine issue as to whether Plaintiff exhausted administrative remedies. In his Declaration, Plaintiff claims that he submitted at least fifty grievances concerning this incident, including one grievance alleging Defendant Powell and other officers used excessive force against him. Plaintiff alleges he never received the grievance back from prison officials. Attached to Plaintiff's Original Complaint, was an unprocessed Step 1 grievance form, in which Plaintiff claimed that Defendant Powell and other correctional officers threw him on a gurney. There is no indication that the grievance form was ever sent to prison officials. (Doc. #1 at 40-41.) In addition, there is no record that the grievance was received by prison officials, although other grievances filed about the same incident were received by prison officials, processed, and returned the Plaintiff with responses. Plaintiff points to possible grievances filed in 2019, but does not address how, even if those grievances were related to the claims against Defendant Powell, those grievances would have been timely to exhaust claims arising from an incident in 2017.

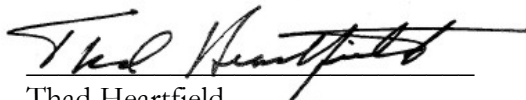
In *Kidd v. Livingston*, the Fifth Circuit held that the Plaintiff's conclusory assertions that he exhausted administrative remedies and the production of unprocessed grievance forms are insufficient to create a genuine dispute as to whether Plaintiff exhausted administrative remedies. *Kidd v. Livingston*, 463 F. App'x 311, 313 (5th Cir. 2012). The evidence of exhaustion in this case is substantially similar to the evidence produced in *Kidd*. As a result, the competent summary

judgment evidence is insufficient to create a genuine issue of material fact as to whether Plaintiff exhausted administrative remedies, and it is appropriate to grant Defendant Powell's Motion for Summary Judgment.

ORDER

Accordingly, Plaintiff's Objections are OVERRULED. The findings of fact and the conclusions of law of the magistrate judge are correct, and the Report and Recommendation of the magistrate judge is ADOPTED. Defendant Powell's Motion for Summary Judgment is GRANTED, and Defendant Toby Powell is DISMISSED from this action.

**SIGNED** this the 22 day of April, 2022.

  
Thad Heartfield  
United States District Judge